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In the Supreme Court of the United States

October Term, 1969

No. 597

FRANK CONROY,

Petitioner,

vs.

CITY OF MIAMI BEACH, FLORIDA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

INTRODUCTORY STATEMENT

Petitioner prays that a Writ of Certiorari issue to review a decision below of the Supreme Court of Florida. For the most part, the parties will be referred to by name or as they stand in this Court. The symbol "A" shall be used to designate the Petitioner's Appendix. The symbol "R" shall be used to specify the record which Petitioner's counsel informs us has been transmitted to this Court.

OPINIONS BELOW

The Opinion of the Municipal Court of the City of Miami Beach, Florida, is not reported, but the disposition of the cause appears at A-5.

The Order of Affirmance dated June 12, 1968, of the Circuit Court in and for Dade County, Florida, is not reported, but appears at A-29. Petitioner's timely Petition for Rehearing was denied on July 18, 1968, and appears at A-30-31.

The decision of the District Court of Appeal, Third District of Florida, is reported in memorandum form in 217 So.2d 164. It also appears at A-34. Petitioner's timely Petition for Rehearing was denied on January 8, 1969, and appears at A-35.

The decision of the Supreme Court of Florida dated May 9, 1968, is reported in memorandum form in 225 So.2d 910. It also appears at A-1. Petitioner's timely Petition for Rehearing was denied on June 16, 1969, and appears at A-2.

JURISDICTION

According to the Petitioner, he "believes" that jurisdiction is invoked under 28 U.S.C. Sec. 1257(3).

QUESTIONS PRESENTED

According to the Petitioner, the petition presents the following questions:

> "1. Whether or not a petitioner has a constitutional right guaranteed by the 14th Amendment to the United States Constitution to call his attorney at the time of his arrest but before being taken to the police station.
>
> "2. Whether, when the petitioner attempts to call his attorney immediately following his arrest, but before being taken to the police station, is he guilty of resisting arrest in violation of a municipal Code provision, or, does he have a constitutional right, guaranteed by the 14th Amendment to the U.S. Constitution to call his attorney at that time without being guilty of resisting arrest by his attempt to make such a call?
>
> "3. Whether or not petitioner has a right to resist an arrest by exercising a constitutional right guaranteed him by the 14th Amendment to the U.S. Constitution, by refusing to go to the police station voluntarily with the police officer following his arrest until such time as he would be allowed to telephone his attorney."

STATEMENT OF THE CASE

Petitioner's statement is argumentative and incomplete. The Respondent-City, therefore, restates the case as follows:

Petitioner was charged with violating Section 25-66 of the Code of the City of Miami Beach, Florida, on March 8, 1967, to wit:

> "Obstructing officers in exercise of duties. "did then and there knowingly and willfully, obstruct, or oppose a duly appointed, qualified, and acting police officer of the City of Miami Beach, Florida, in the lawful execution of a legal duty being performed by him, to wit: bringing subject to station to post bond on traffic violation, subject resisted and refused to accompany officer." (A-5)

Petitioner was found guilty as charged in the Municipal Court of the City of Miami Beach and was ordered to pay a fine of $50.00 plus $4.00 court costs, or serve ten days in the city jail (A-5).

Officer Charles Reed of the City of Miami Beach testified before the Municipal Court below that he observed the Petitioner on March 8, 1967, traveling at the rate of approximately 43 miles an hour in a 20 mile an hour zone from 14th Street and Ocean Drive southward (A-8). Thereafter, at a service station, on the same date, Officer

Reed informed the Petitioner that he was being charged with speeding and requested him to sign the appearance portion of the ticket explaining at the same time that such signature was merely a promise to appear in court and was not a plea of guilty in any way (A-9). Petitioner refused to sign the ticket, whereupon Officer Reed advised him that he was under arrest for speeding and that Petitioner would have to accompany him to the station in order to post an appearance bond (A-9). Petitioner responded "I'm not accepting the ticket, and I'm not going anywhere with you . . ." (A-9). Petitioner had been advised that he was under arrest (A 9, 10, 11). Petitioner refused to accompany the officer to the station (A 9, 10, 11). At this point, Petitioner walked away from Officer Reed and went into the office of the service station ostensibly to call his attorney (A 9, 10, 16). Officer Reed informed Petitioner that he would be permitted to call his attorney from the police station (A-10), which Petitioner also admitted. Petitioner physically picked up the telephone in order to make his call and Officer Reed placed his finger upon the receiver button (A-10). Petitioner then slapped the officer's hand away from the phone and a struggle ensued between Petitioner and the officer (A-10). After a great struggle, the officer handcuffed the Petitioner and restrained him until other officers were able to come to his assistance in order to take the Petitioner to the police station (A-10, 11).

Petitioner appealed his conviction to the Circuit Court, in and for Dade County, Florida, and the Circuit Court affirmed the conviction on June 24, 1968 (A-29). On July 18, 1968, the Circuit Court denied Conroy's Petition for Rehearing (A-2) stating: (contrary to what appears to be quoted material at Page 13 of Conroy's petition herein):

> "1. Due process of law and the right to a fair trial, as well as the right to counsel, as guaranteed by the 14th Amendment to the United States Constitution, as well as Sections 8 and 12 of the Declaration of the Rights of the Florida Constitution, do not encompass any constitutional right of a person to make a telephone call at the time of his arrest, but before being taken to the police station.
>
> "2. The trial Court was eminently correct in entering its judgment of conviction and sentence adjudicating that Defendnt-Appellant resisted arrest as charged pursuant to the Code of the City of Miami Beach, Florida, by refusing to go to the police station with the police officer following his arrest." (A 30, 31)

Petitioner sought a common-law writ of certiorari in the District Court of Appeal, Third District of Florida, to review the Circuit Court's affirmance. The Third District Court of Appeal's decision in *Conroy v. City of Miami Beach*, is reported in memorandum form in 217 So.2d 164 (Fla. 3dDist. 1969). The order below reads as follows:

> "This cause having heretofore been submitted to the Court on petition for writ of certiorari upon the transcript of record and briefs to review the order of the Circuit Court for Dade County (#6335) in said cause bearing date June 12, 1968 and the record having been considered, it is ordered that said petition be and the same is hereby denied." (A-34)

Petitioner's petition for rehearing (A-34) was denied by the District Court on January 8, 1969 (A-35).

Thereafter, pursuant to Art. 5, Sec. 4 *Fla. Const.* and Fla. App. R.4.5c(6), the Petitioner filed a Petition for Writ of Certiorari to the District Court of Appeal, Third District, seeking review of the decision of the District Court of Appeal before the Supreme Court of Florida on a "direct-conflict" basis.[1] The Supreme Court's decision in *Conroy v. City of Miami Beach*, is reported in memorandum form in 225 So.2d 910 (Fla. 1969). The order below reads as follows:

> "This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5c(6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied." (A-1)

Petitioner's Petition for Rehearing was denied by the Supreme Court of Florida on June 16, 1969 (A-2).

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[1]Fla. App. R.4.5c(6) provides in part:

> "Where any decision of a district court of appeal . . . (3) is in direct conflict with a decision of another district court of appeal or of the Supreme Court on the same point of law, petition may be filed with the Supreme Court to issue a writ of certiorari to review such decision."

This was the *sole* issue before the Supreme Court of Florida.

REASONS FOR DENYING THE WRIT

I. No substantial federal question is raised by the petition for writ of certiorari.

It has long been settled by this Court and really requires no citation of authority that this Court has no jurisdiction to review a state court decision unless it appears affirmatively from the record that a substantial federal question is not only presented to this Court, but was presented for decision to the highest court of the state having jurisdiction. It is also necessary that the federal question be actually decided by the state court involved. See *Southwestern Bell Telephone & Telegraph Co. v. State of Oklahoma*, 303 U.S. 206, 58 S.Ct. 528, 82 L.Ed. 751 (1938); *Grisanti v. City of Cleveland, Ohio*, 371 U.S. 68, 83 S.Ct. 111, 9 L.Ed 2d 119 (1962); *Wetzel v. Ohio*, 371 U.S. 62, 83 S.Ct. 111, 9 L.Ed. 2d 26 (1962); *Seaboard Air Line Railway v. Watson*, 287 U.S. 86, 53 S.Ct 32, 77 L.Ed. 180 (1932). It is abundantly clear that the decision sub judice was based on non-federal grounds and these non-federal grounds furnished a proper basis to support the judgment of the Supreme Court of Florida.

In this cause it is respectfully submitted that no substantial federal question has been presented to this Court. In fact, Petitioner's assertion of a federal question appears to be unsubstantial as not to really require further argument. It is significant that the Petitioner is unable to *positively* point to any authority in support of their position.

II. The authorities relied upon by Petitioner militate most strongly against his contentions.

In the case at bar, Petitioner was never deprived of counsel. He was informed at the time of arrest that he could call an attorney from the police station, and Petitioner was represented at all stages hereof by counsel. Petitioner merely asserts that he had *the right to call counsel at the time of arrest on the street* — at a point which was not investigatory, absent "custodial interrogation" and which could hardly be considered "critical." In short, Petitioner presupposes a constitutional right *to call* counsel at the time of being stopped by police for a traffic offense on the street. *Cf.* Anno., *Right of Motorist Stopped by Police Officers for Traffic Offense to be Informed at that Time of His Federal Constitutional Rights Under Miranda v. Arizona*, 25 A.L.R. 3d 1076. Any authority for this contention is conspicuously absent from the Petitioner's Petition.

Petitioner's "string citation" set forth at pages 14, 15 and 16 of the petition are so inopposite as to hardly require response. Analysis of the cited cases reveal that they have no bearing on the issue here before the Court.

In *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963), this Court held that an indigent charged with a felony under state law has a right, and under the 14th Amend., *U.S. Const.*, must be furnished legal counsel at public expense to represent and advise him at the time of the trial in a state court. *Gideon* has been extended through subsequent decisions, but not to the point of creating a right to call counsel at the time of arrest on

the street for a misdemeanor. *Escobedo v. Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed. 2d 977 (1964), holds that an accused in a state prosecution was denied the assistance of counsel, and that no pretrial statement elicited by the police during interrogation might be used against him at his trial, where the police investigation, conducted prior to indictment, was no longer a general inquiry into an unsolved crime, but had begun to focus on a particular suspect and the suspect had been taken into police custody. In *Escobedo*, the police carried out a process of interrogation that lent itself to eliciting incriminating statements, the suspect had requested and been denied an opportunity to consult with his lawyer, and the police had not effectively warned him of his constitutional right to remain silent. In the case sub judice, Petitioner fails to argue that *Escobedo* is even remotely in point, but seeks comfort from the mere citation of the case.

Petitioner's reliance upon *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) is equally misplaced. There this Court held that in the absence of a suspect's intelligent waiver of his pertinent constitutional rights, the suspect, before any "custodial interrogation," must be warned in clear and unequivocal terms

(1) that he has a right to remain silent,

(2) that any statement he does make may be used as evidence against him,

(3) that he has a right to consult with, and have present prior to and during interrogation, an attorney, either retained or appointed, and

(4) that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Each of these four warnings must be given. Clearly Petitioner fails to argue *Miranda* in light of its holding.

In *Hamilton v. State of Alabama*, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed. 2d 114 (1961), this Court promulgated the "critical stage" test in relation to the right to counsel. (It was a capital case where the Petitioner claimed that he had been denied counsel at the time of arraignment.) This Court concluded that the right to counsel under the 14th Amend., *U.S. Const.* arises at any "critical stage in a criminal proceeding." Petitioner's reliance upon *Hamilton* to create a right *to call* counsel from the street at the time of arrest is groundless.

A *denial* of certiorari in *Winters v. Beck*, 385 U.S. 907, 87 S.Ct. 207, 17 L.Ed. 2d 137 (1966), can hardly be considered authority to support the Petitioner. At issue was the scope of Gideon to misdemeanor cases. A question was raised as to the *right* to counsel, but not *when* counsel is to be provided.

In reversing a state court conviction, where the defendant appeared at trial and was denied a request for a continuance to obtain counsel, in *Chandler v. Fretag*, 348 U.S. 3, 75 S.Ct. 1, 99 L.Ed. 4 (1954), this Court observed:

> "Regardless of whether petitioner would have been entitled to the appointment of counsel, his right to be heard through his own counsel was unqualified." 348 U.S. at 9.

Petitioner clearly enjoyed this right throughout this cause and makes no claim to the contrary.

Respondent fails to see the relevance of *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed. 2d 106 (1965). There this Court reversed a first degree murder conviction holding that the trial court's and prosecutor's comments on the defendant's failure to testify violated the self-incrimination clause of the 5th Amend., *U.S. Const.* The same may be said concerning the Petitioner's reliance upon *Douglas v. People of State of California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963). In *Douglas*, this Court held that indigent defendants were denied the equal protection of the law where the merits of the one appeal they had as a matter of right from their convictions were decided without the benefit of counsel, following a determination by the appellate court (pursuant to a California rule of criminal procedure) that appointment of counsel would be of no value to the defendants or the court. *Douglas* is not even remotely analogous to the case sub judice.

Respondent's reliance upon *Application of Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed. 2d 527 (1967) is totally without foundation. There, this Court held that a juvenile has the right to notice of charges, to counsel, to confrontation and cross-examination of witnesses, and to the privilege against self-incrimination. *Gault*, has nothing whatever to do with the case at bar.

It is clear that Petitioner gains no solace from his dependance upon *Wright v. State of Georgia*, 374 U.S. 284, 83 S.Ct. 1240, 10 L. Ed. 2d 349 (1963) and *Cox v. State of Louisiana*, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed. 2d 487 (1965). In *Wright*, this Court reserved convictions for

breach of the peace where there was no showing that the Negro Defendants, who had been ordered to leave a municipally owned park and who were thereafter charged with breach of the peace had *adequate notice* that their conduct, in peacefully playing basketball at the park, was prohibited by the breach of the peace statute. Of critical importance was the fact that the order of the police officers was *admittedly* based upon their intention to enforce racial discrimination in the park. Hence, the order was violative of the equal protection clause of the *U.S. Const. Wright* is certainly not applicable herein. In *Cox*, the defendant had been convicted of violating a Louisiana Statute punishing picketing "near" a courthouse. Permission had been given for demonstrators to meet, across the street from a courthouse, 101 feet from the courthouse steps. The Sheriff ordered the meeting dispersed based upon the defendant's remarks, which the Sheriff considered to be a breach of the peace. This Court held that the defendant's conviction could not be upheld on the basis of the dispersal order. First Amendment freedoms could not be at the mercy of such whim or caprice as the facts revealed. Defendant had the right to rely upon the permission given him under the facts presented. Both *Wright* and *Cox* can hardly even be considered persuasive herein.

Finding no comfort in the decision of this Court, Petitioner turns to three (3) state cases in desperation. *City of Tacoma v. Heater*, 409 P.2d 867 (Wash. 1966), involved a prosecution for driving under the influence of intoxicating liquor. The Defendant was convicted at trial and a Court reversed. Under the following facts, the majority held that the Defendant was deprived of counsel resulting in irreparable prejudice to his defense.

"The defendant was involved in a minor traffic accident. The officers who investigated the accident determined that the defendant was under the influence of intoxicants and took him to the city jail under arrest. The defendant denied that he was under the influence of intoxicating liquor. Upon arrival *at the jail*, the defendant requested permission to telephone his attorney, but was denied the right to do so.

"The police officers then proceeded to administer certain physical and coordination tests to the defendant to ascertain his sobriety. The defendant refused to take a chemical sobriety test. He repeatedly renewed his request to telephone his attorney, but was not permitted to do so because the police department's regulations permit officers to deny to a person charged with an offense involving intoxication the right to make a telephone call until after the expiration of 4 hours following his arrest.

"Immediately after the tests were administered, the defendant was charged with the offense of driving while under the influence of liquor. He was not permitted to call his attorney until 4:00 A.M. on the morning following his arrest. The defendant's attorney stated that if he had been called he would have arranged for a blood test to determine the defendant's condition." (Footnote omitted.) *Id.* at 868,869.

The majority rationalized its holding by finding the time immediately *after* the officers conducted their tests for sobriety, interrogated the defendant and charged the defendant to be a "critical stage" in the case. Therefore, the denial of the defendant's request to call counsel *at this point in time* prejudiced his preparation of a defense. In the case at bar, the very relief sought in *Heater* was granted by the officer. There was no interrogation, tests administered or holding of the defendant incommunicado pursuant to police regulation in the case at bar.

State v. Krozel, 24 Conn. Sup. 266, 190 A.2d 61 (Conn. App. 1963) is similar to *Heater*, supra. The defendant was charged and convicted of operating an automobile under the influence of intoxicating liquor. On appeal, it was held that the denial of permission to the defendant, who was capable of using the telephone and who had the ability to pay for legal assistance, to telephone his wife and lawyer from the police headquarters *after* he had been interrogated by state troopers and *after* he had been charged, constituted a denial of assistance of counsel. As in *Heater*, supra, the refusal was based upon a four (4) hour waiting period for the use of the telephone following arrest for intoxication. Respondent's comments concerning *Heater*, supra, are definitely applicable here.

Lastly, Petitioner relies upon *Briggs v. State*, 367 S.W.2d 750 (Ark. 1963), a "sit-in" case. There, the Court found that some of the defendants had not unlawfully refused to leave an establishment since there was no refusal to leave at the request of the management or of police officers acting in compliance with a request from the management. It is abundantly clear that *Briggs* has nothing whatsoever to do with the issue here before the Court.

III. Petitioner merely seeks another appeal.

Petitioner has not stated the "Questions Presented" or the "reasons" for Granting the Writ with the required "accuracy, brevity, and clearness" pursuant to Supreme Court Rule 23(4). The Petitioner is simply seeking to have this Court re-examine the proceedings below in the light of an appeal to this Court. It is submitted that this is not permitted.

CONCLUSION

It is respectfully submitted that the Petition for Writ of Certiorari to the Supreme Court of Florida should be denied.

Respectfully submitted,

HARRIS J. BUCHBINDER
825 Arthur Godfrey Road
Miami Beach, Florida 33140
Special Counsel for Respondent
CITY OF MIAMI BEACH,
FLORIDA

JOSEPH A. WANICK, City Attorney,
and IRA M. ELEGANT, Assistant City Attorney
1130 Washington Avenue
Miami Beach, Florida 33139
Of Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Respondent's Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of Florida, was mailed to the Attorney for the Petitioner, THEODORE M. TRUSHIN, 420 Lincoln Road, Miami Beach, Florida 33139, this 9th day of October, 1969.

/s/ Harris J. Buchbinder

HARRIS J. BUCHBINDER